

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2426

Docket No. 74-2426

CARRIE L. HAZZARD,

Plaintiff-Appellant,

v.

CASPAR WEINBERGER, SEYMOUR FIER, BRENDAN)
BYRNE, WILLIAM F. HYLAND, WILLIAM T.)
SOMMERS, H. A. MCGOWAN, JAMES A. ALLOWAY,)
JOHN A. MCGARRITY, JOHN J. SPIELBERGER,)
MALCOLM WILSON, LOUIS J. LEFKOWITZ, AL-)
BERT D'ANTONI, ROBERT F. BARRECA, FRANK)
MORGANO, JOSEPH V. TERRENZIO, DR. E. A.)
STERN, MARTIN WALTERS, DONALD ALEXANDER,)
ABRAHAM BEAME, JULES M. SUGARMAN, MARTTIE)
LOUIS THOMPSON, ROBERT PILLER, W. D.)
ULLRICH, individually and in their)
official capacities,)

Defendants-Appellees.)

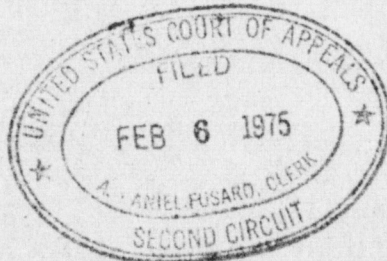
Civil Action

On Appeal From the United
States District Court
for the Southern District
of New York

Sat Below:

Milton Pollack, U.S.D.J.

BRIEF FOR DEFENDANTS-APPELLEES BYRNE, HYLAND, ALLOWAY,
MCGARRITY, ULLRICK



WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-
Appellees Brendan Byrne,
New Jersey Governor;
William F. Hyland, New
Jersey Attorney General;
James A. Alloway, President
New Jersey Dept. of Civil
Service; John A. McGarrity,
Assistant Director, N. J.
Div. of Pensions, Dept. of
The Treasury; and V. D.
Ullrich, N.J. Workmen's
Compensation Board
State House Annex
Trenton, New Jersey 08625

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PRELIMINARY STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of New York dismissing in its entirety a complaint containing multiple claims against multiple defendants. This brief is submitted in behalf of
10 five defendants named in the complaint as State of New Jersey officials: (1) Brendan Byrne, Governor of New Jersey; (2) William F. Hyland, Attorney General of New Jersey; (3) James A. Alloway, President, New Jersey Department of Civil Service; (4) John A. McGarrity, Assistant Director, Division of Pensions, New Jersey Department of the Treasury; and (5) V. D. Ullrick, an official of the
20 Workmen's Compensation Board, New Jersey Department of Labor and Industry (hereafter New Jersey appellees).*

Carrie L. Hazzard (hereafter appellant) filed her complaint May 14, 1974 against 23 defendants consisting of named officials of the United States, New York State, New York City, New Jersey State

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*On July 8, 1974 a purported "Amendment to Complaint" was filed which named as additional State of New Jersey appellees Joseph A. Hoffman as Commissioner of the Workmen's Compensation Board [sic] [factually, Commissioner, New Jersey Department of Labor and Industry] and Mortimer G. Neumond [sic] [shcild be Newman], Clerk, Superior Court of New Jersey, as agent for Security Insurance Company of Hartford. The amendment contains no claims or factual assertions and the original complaint contains no mention of Mr. Hoffman or Mr. Newman. Apparently neither was personally served with process.

and Atlantic City, New Jersey, governments and named officials of various non-government agencies and corporations located in New York State or New York City. The New Jersey appellees were served in Trenton on May 24, 1974. On June 21, 1974 they filed a notice of motion with supporting affidavits for summary judgment, judgment dismissing the complaint and order extending the time to file responsive pleading. Oral argument on this motion and the motions of other parties was held September 13, 1974 before the Honorable Milton Pollack, U.S.D.J. The opinion ordering dismissal of the complaint in its entirety was issued and filed September 27, 1974, Hazzard v. Weinberger, et al., 382 F. Supp. 225 (S.D. N.Y. 1974). Appellant's Notice of Appeal to this court was served on October 25, 1974 and her brief on December 11, 1974 upon the New Jersey appellees.

STATEMENT OF FACTS

10 Federal jurisdiction of the complaint was considered as being claimed under 28 U.S.C. § 1343 since the complaint asserted it was made pursuant to 42 U.S.C. §§ 1983 and 1985 and the Fourteenth Amendment. The complaint contains multiple unrelated claims against multiple defendants. Appellant stressed at oral argument and on her purported "Amendment to Complaint" that the complaint was against the parties in their official government capacity and not as individuals.

20 The complaint asserts a general conspiracy participated in by all defendants. This allegation as to the New Jersey appellees merely states that they, with the other defendants are guilty of this conspiracy "by their silence" and are "the cause of all the trouble."

30 The portions of the complaint specifically directed against the New Jersey appellees claims entitlement to pension and workmen's compensation benefits on account of Wesley Hazzard (hereafter decedent) accruing during his lifetime, at the time of his death in 1967 and after his death and damages for negligence and malfeasance in failing to correct the death certificate of decedent to reflect his martial status at death as married instead of widowed. The only facts asserted to support the claimed entitlements are the status of appellant as decedent's widow; the demand by appellant and refusal by the New Jersey appellees to pay the claimed benefits and to correct the death certificate; decedent's employment by Atlantic City from 1940 to his death

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in 1967; and an injury not identified as to time or nature sustained by decedent during his Atlantic City employment. No other facts are alleged nor any personal action by individual named New Jersey appellees in reference to the claims against the New Jersey appellees.

10 The New Jersey appellees moved for summary judgment and dismissal of the complaint on the grounds of res judicata of two prior final decisions of the federal courts and two prior State of New Jersey administrative actions; failure of the complaint to state a cause of action upon which relief can be granted, and lack of federal jurisdiction of the person of the New Jersey appellees and the subject matter of the complaint.

20 The motion of the New Jersey appellees was supported by two attached affidavits with attached exhibits fully documenting the prior federal litigation and State administrative action.* This evidence established that on April 7, 1970 and October 13, 1971, the State of New Jersey through the Registrar of Vital Statistics upon
30 appellant's application issued corrections to decedent's death certificate changing the marital status asserted therein from widowed to married. In January 1971, appellant filed a complaint against the State of New Jersey and the Public Employees' Retirement System of the State of New Jersey, Division of Pensions, Department of the

40 * The affidavits are of F. Merton Saybolt, State Registrar of Vital Statistics, New Jersey State Department of Health dated June 10, 1974 and Prudence H. Bisbee, Deputy Attorney General for the State of New Jersey, Attorney of Record in the two prior federal litigations dated June 20, 1974.

Treasury asserting entitlement to pension and workmen's compensation benefits as widow of decedent and damages for negligence and malfeasance in issuing and failing to correct the death certificate of decedent in regard to decedent's marital status at death. This action was commenced in the U. S. District Court for the Southern District of New York but thereafter transferred to the U. S. District Court for New Jersey. An Order for Summary Judgment in favor of all named defendants was entered by the Honorable Mitchell H. Cohen, U.S.D.J., November 11, 1971 for the reason that "the pleading, affidavits, briefs, and argument. . .show palpably that there is no genuine issue as to material fact challenged, and that defendants. . .have a right to such a judgment as a matter of law. . .," Hazzard v. City of Atlantic City, et al., Civ. 1052-71 (D. N.J. Nov. 11, 1971). No appeal was taken from this final judgment. On April 1972 by a "Motion for Joinder and to Amend Complaint," appellant commenced a second action against the State of New Jersey as the named defendant, asserting negligence and malfeasance in issuing an erroneous death certificate for decedent and participation in a criminal conspiracy with the federal and New York State governments in permitting and issuing the "fraudulent death certificate." This action was commenced in the U.S. District Court for the Southern District of New York by amendment to a complaint filed in February 1972 against multiple defendants. By memorandum opinion of the Honorable Marvin E. Frankel, U.S.D.J., dated December 5, 1972, the complaint was dismissed in its entirety. The dismissal

as to the State of New Jersey was that the allegations of conspiracy was vague and conclusionary and therefore insufficient for jurisdiction under the Civil Rights statutes; no diversity jurisdiction existed since a state is not a citizen for purpose of diversity jurisdiction and "In addition, the defense of res judicata [of the 1971 federal court judgment] appears to be independently dispositive," at p. 13 incorporating by reference pp. 8 to 12 of the opinion. No appeal was perfected by appellant from this final determination. Hazzard v. Commodore Hotel, et al., Pro Se 72 Civ. 746 (S.D. N.Y. Dec. 5, 1972), cert. denied, 414 U.S. 1134 (1974), petition for rehearing denied, U.S. Sup. Ct., 73-5624 (Mar. 18, 1974), appeal dismissed for lack of prosecution, 73-1045 (2d Cir. May 21, 1974).

Appellant's present complaint on appeal before this court was dismissed in its entirety by the Honorable Milton Pollack, U.S.D.J., September 27, 1974. The judge found the conspiracy assertions were vague and conclusionary and therefore insufficient to give the district court jurisdiction of the subject matter of the complaint as to all defendants. The judge found that the specific claims against the New Jersey appellees were barred by the res judicata of the 1971 and 1972 final decisions in appellant's prior federal litigations and the Eleventh Amendment.

ISSUES PRESENTED

Did the District Court properly dismiss the complaint for lack of jurisdiction as to the New Jersey appellees on the grounds that:

10 (a) the complaint is barred by res judicata of the final decisions in Hazzard v. City of Atlantic City, et al., Civ. 1052-71 (D. N.J. Nov. 11, 1971) and Hazzard v. Commodore Hotel, et al., pro se 72 Civ. 746 (S.D. N.Y. Dec. 5, 1972), cert.denied, 414 U.S. 1134 (1974), petition for rehearing denied, U.S. Sup. Ct., 75-5624 (Mar. 18, 1974), appeal dismissed for lack of prosecution, 73-1045 (2d Cir. May 21, 1974);

20 (b) the complaint is barred by the Eleventh Amendment;

(c) the conspiracy allegations are too vague;
and conclusionary to confer jurisdiction?

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN DISMISSING
THE COMPLAINT FOR LACK OF JURISDICTION ON THE
BASIS THE COMPLAINT IS BARRED BY RES JUDICATA
AND THE ELEVENTH AMENDMENT AND THE CONSPIRACY
ALLEGATIONS ARE TOO VAGUE AND CONCLUSIONARY TO
CONFER JURISDICTION.

A. THE RES JUDICATA BAR

The District Court correctly ruled that the present complaint is barred by the final decisions in the two prior federal district court litigations entered November 11, 1971 and December 5, 1972. A comparison of the complaints demonstrate each arises from the same operative facts; specifically, the decedent's employment by Atlantic City for the 27 years preceding his death and the error in decedent's death certificate recording his marital status as widowed instead of married. The first Hazzard complaint presents the same claims asserted in the present complaint; specifically, entitlement to pension and workmen's compensation benefits arising from decedent's employment and death and damages for the error in the death certificate. The second Hazzard complaint presents the new claim of criminal conspiracy repeated in the present complaint. The decisions in the two prior litigations binds appellant since res judicata binds a party on every matter litigated in a prior suit and also every matter which could have been litigated, Towle v. Boeing Airplane Co., 364 F.2d 590 (8th Cir. 1966). Although the

names of the New Jersey defendants differ in these litigations, the New Jersey appellees in this case are in fact identical to the New Jersey defendants in the prior actions. Appellant merely substituted for the State of New Jersey and its retirement system the present appellees as officials of the State of New Jersey. The present complaint is the third attempt of appellant to litigate the same causes of action against the State of New Jersey. The purpose served by res judicata is to provide a final end to litigation. This meritorious purpose is underscored in this kind of case where there is palpably no legal basis for the claims presented.

The pension allegations fail to assert facts establishing a threshold basis for a claim by the lack of any factual allegation of decedent's membership and contributions to a state administered retirement system or pension fund. The governing statutes of the Public Employees' Retirement System which is the only state system covering decedent's public employment position bars payment of retirement and death benefits on account of public employees not members or contributors of the retirement system, N.J.S.A. 43:15A-41.1(a), N.J.S.A. 43:15A-70 (see generally N.J.S.A. 43:15A-6 et seq., former N.J.S.A. 43:14-1 et seq. and N.J.S.A. 43:15-1 et seq. repealed with portions saved from repeal by L. 1954, c. 84, §4 to §5, N.J.S.A. 43:15A-4 to N.J.S.A. 43:15A-5).^{*} Moreover, decedent was not required

^{*} Former N.J.S.A. 43:14-1 et seq. and N.J.S.A. 43:15-1 et seq. are printed in full in the present edition of the New Jersey Statutes Annotated at its proper numerical location. These provisions govern the former State Employees' Retirement System which was terminated but continued as the Public Employees' Retirement System on January 2, 1955.

to be a member of the retirement system during his Atlantic City public employment. Atlantic City adopted the State retirement system effective July 1, 1949 by voter referendum pursuant to former N.J.S.A. 43:15-1, now N.J.S.A. 43:15A-74. Persons employed by Atlantic City after July 1, 1949 are required to join the retirement system as a mandatory condition of employment. A person employed prior to this date as decedent may join the retirement system at his option at any time during the continuation of his public employment but he is not required to do so, former N.J.S.A. 43:15-2, now N.J.S.A. 43:15A-75. Decedent did not exercise his personal option to become a member at any time after July 1, 1949 and before his death in 1967. It is well established in New Jersey law that a public employee and his beneficiary have only the pension rights and benefits as are based upon and within the scope of the relevant statutory provisions, Matthews v. Board of Education of Irvington, 31 N.J. Super. 292, 296 106 A.2d 346, 348 (App. Div. 1954); Casale v. Pension Comm., etc, of Newark, 78 N.J. Super. 38, 40, 187 A.2d 372, 373 (Law Div. 1963), see also Spina v. Consolidated Police and Firemen's Pension Fund Comm., 41 N.J. 391, 197 A.2d 169 (1964). Accordingly the lack of membership and contributions of decedent bars any consideration of a pension claim on account of decedent against a State of New Jersey retirement system. Obviously no workmen's compensation claim exists against the State of New Jersey since the State was not decedent's employer and the claim against Atlantic City is barred by a two year statute of

of limitation, see N.J.S.A. 34:15-41 and N.J.S.A. 34:15-51.

No cause of action was asserted in relationship to the death certificate. The original and corrected death certificates were issued pursuant to and in accordance with New Jersey law. The factual assertions on the original certificate were supplied by an informant and/or treating physician; in this case both private citizens, N.J.S.A. 26:8-4. The responsibility to initiate correction of errors is placed on private persons having personal knowledge of the error such as appellant. The error in decedent's marital status was properly corrected upon appellant's application in 1970 and again in 1971 by the State of New Jersey in the form and manner prescribed by law, N.J.S.A. 26:8-48 to N.J.S.A. 26:8-54. Moreover it is clear appellant suffered no damage while the error remained on the death certificate. The pension and workmen's compensation claims on account of decedent are barred on grounds other than appellant's widow's status as stated supra. It is clear by the federal appellee's evidence that social security widow's benefits are not payable for reasons other than a question regarding appellant's widow's status. Accordingly, there is no palpable basis for a claim arising from the corrected error in the death certificate.

In view of the meritorious purpose of res judicata to provide a final end to litigation particularly in a case otherwise presenting no legal basis for a claim, it is clear the District Court

correctly ruled that the present complaint is barred by the final decisions in the prior federal litigation prosecuted by appellant.

B. THE ELEVENTH AMENDMENT BAR:

The District Court correctly ruled that the complaint against the New Jersey appellees is barred by the Eleventh Amendment. The complaint seeks nothing more than a money award for statutory benefits and tort damages. The appellant clearly does not expect payment from the individual appellees since she stressed at oral argument in the District Court and on her papers she is suing the named New Jersey appellees in their government capacity as New Jersey State officials and not as individuals. Accordingly the complaint seeks nothing more than the payment of a retroactive award from the general treasury of the State of New Jersey. This kind of award is barred by the Eleventh Amendment, Edelman v. Jordon, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed 2d 662 (1974). Moreover, the State of New Jersey has not waived its sovereign immunity from suit in courts other than those of its own creation to provide a waiver of the Eleventh Amendment protection, Edelman v. Jordon, supra, 415 U.S. ____ 94 S. Ct. 1361. In fact in New Jersey State courts the sovereign immunity of the State from suit is applicable to all claims as in this case accruing prior to July 1, 1972, S.J.Groves & Sons, Company v. New Jersey Turnpike Authority, 266 F. Supp. 568, 570 (D. N.J. 1967); Clark v. State of Washington, 366 F. 2d 678 (9th Cir. 1966), see

N.J.S.A. 59:12-3, N.J.S.A. 59:14-4. Accordingly, the District Court properly dismissed the complaint as to the New Jersey appellees for lack of jurisdiction on the bar of the Eleventh Amendment.

C. THE CONSPIRACY CLAIM

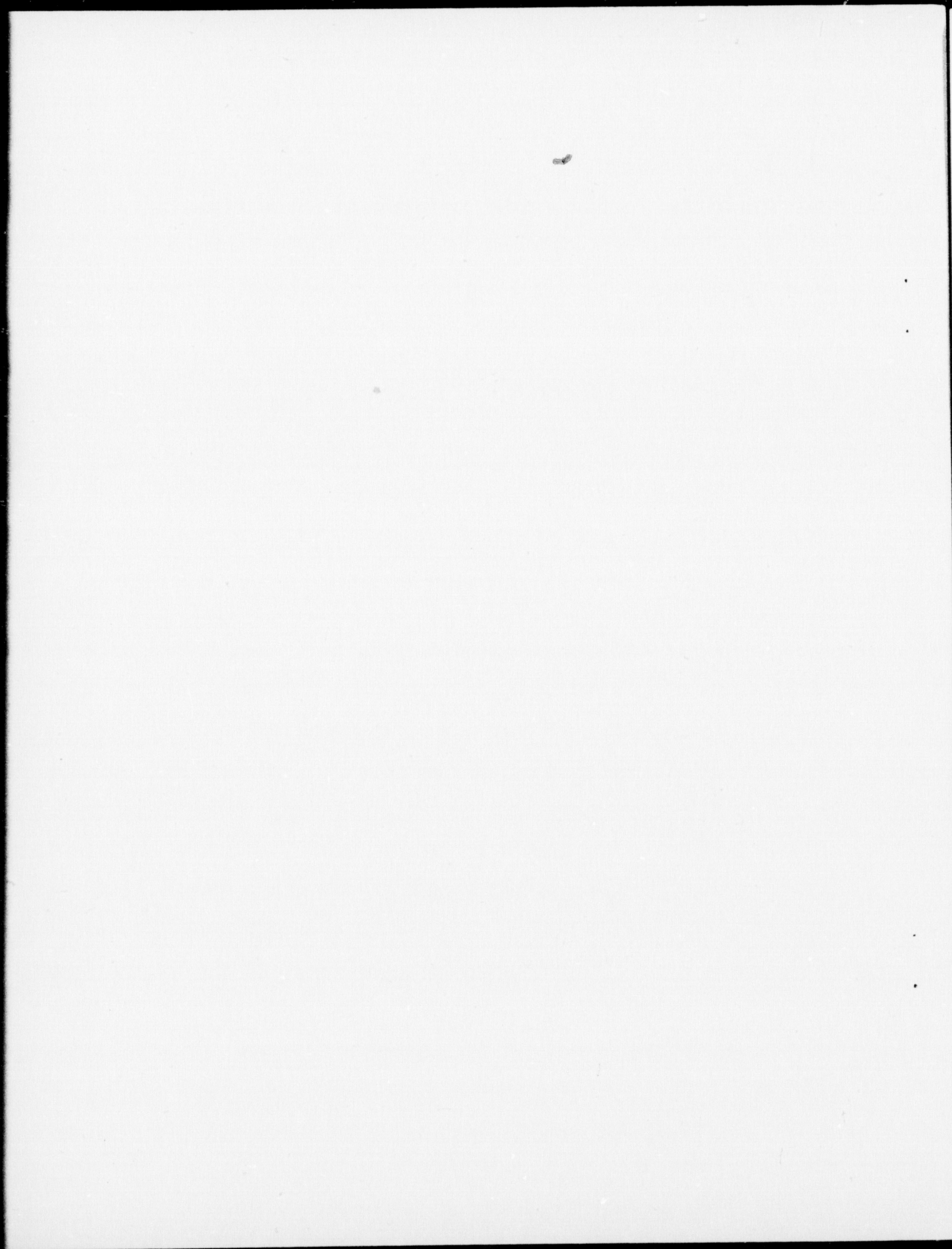
10 The District Court correctly ruled that the conspiracy allegations of the complaint are too vague and conclusory to confer jurisdiction through a claim under 42 U.S.C. §1983. Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972), Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964). In fact the complaint fails to allege any individual act by any of the five New Jersey appellees to assert a conspiracy. The allegations speak for themselves as to their vague and conclusory nature in reference to the New Jersey appellees.

20 The conspiracy allegations merely assert:

"[10]. . .Every defendant, herein, is guilty of this crime; their silence make them a party to this "chained conspiracy."

30 [11]. That the New Jersey defendants, Hon. Brendan Byrnes (Governor of New Jersey his attorney General, V. D. Ullrich (of New Jersey's workmen's compensation Board), Hon. William L. Somers or his predecessor, H. A. McGowan, the New Jersey Department of Civil Service John A. McGarrity, the Department of Pensions, Department of the Treasury, John J. Spelberger, (Group Supervisor of the District, Director of Internal Revenue all named herein this complaint is the cause of all the trouble."

40 Accordingly the conspiracy claim was correctly dismissed for lack of jurisdiction of the federal courts.



CONCLUSION

For the above reasons it is respectfully submitted that the order of the District Court dismissing the complaint with respect to the New Jersey appellees should be affirmed.

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Respectfully submitted,

WILLIAM F. HYLAND
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By: Prudence H. Bisbee
Prudence H. Bisbee
Deputy Attorney General

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